

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Central Illinois Public Service :
Company :

-vs-

Spoon River Electric Cooperative:
Inc. :

ESA 249

Petition for Confirmation of :
Exclusive Service Rights - :
Canton Correctional Center. :

ORDER

By the Commission:

On October 29, 1987, Central Illinois Public Service Company ("CIPS") filed a verified Petition with the Illinois Commerce Commission ("Commission") seeking a confirmation of its right to serve the site of the proposed Canton Correctional Center ("Prison") being constructed by and through the Illinois Department of Corrections ("DOC") in the City of Canton, Fulton County, Illinois.

CIPS's right to serve the Prison is contested by Spoon River Electric Cooperative, Inc. ("Spoon River"). Spoon River filed a Counter Petition seeking the right to exclusively serve the Prison.

The Prison is to be located on the West 100 acres of the Southwest Quarter of Section 29 and a portion of the Northwest Quarter of Section 32, in Township 7 North, Range 4 East of the Fourth Principal Meridian, Fulton County, Illinois ("Prison Tract").

Pursuant to notice duly given as required by law and by the rules and regulations of the Commission, 21 hearings were held before a duly authorized Hearing Examiner of the Commission at its offices in Springfield, Illinois, on December 1, 1987, January 22, March 9, May 12, July 7 and 29, August 22 and 31, September 2, 15, 16, 29 and 30, October 21, November 18, December 1, 1988, and January 10, February 7, March 1 and 2, and April 4, 1989. Appearances were entered by counsel on behalf of CIPS and Spoon River, respectively, and by a member of the Commission's Engineering Department. Evidence was presented by the parties and at the conclusion of the hearing on April 4, 1989, the record was marked "Heard and Taken."

CIPS filed its Brief on May 4, 1989. Spoon River and Staff filed Briefs on June 5, 1989. CIPS filed a Reply Brief on June 19, 1989.

The Hearing Examiner's Proposed Order dated June 30, 1989 was mailed by the Commission's Chief Clerk to all persons whose names appeared on the service list maintained for this docket. Exceptions were filed on behalf of CIPS on July 17, 1989, and a Reply to Exceptions of CIPS was filed on behalf of Spoon River on July 27, 1989. The Exceptions and Reply have been considered.

Spoon River filed a Motion for Oral Argument on June 5, 1989, which was granted by the Commission in conference on June 21, 1989. Oral Argument was heard by the Commission on August 8, 1989 and taken under advisement.

Evidence Presented by CIPS and Spoon River

On January 20, 1941, Barney Gavenda ("Gavenda") acquired 6 tracts of land totaling approximately 543.5 acres. Part of the property acquired by Gavenda was located south of Illinois Route 9 in the Southeast Quarter of Section 29, the Southwest Quarter of Section 29, and the Northeast Quarter of Section 32, in Canton Township ("Gavenda Farm"). The Prison Tract was formerly a part of the Gavenda Farm.

Eldon Cook ("Cook") started a 50/50 livestock and farming operation with Gavenda on the Gavenda Farm in 1955. Eldon Cook was a customer of CIPS and also a member and customer of Spoon River. On July 2, 1965, the effective date of the Illinois Electric Supplier Act ("Act"), CIPS was furnishing electric service to Cook on the Gavenda Farm in the Southeast Quarter of Section 29 and Spoon River was furnishing electric service to Cook on the Gavenda Farm in the Northeast Quarter of Section 32. Spoon River was also furnishing electric service to the Central National Bank and Trust Company of Peoria, as agent for Barney Gavenda, at a second and separate meter in the Northeast Quarter of Section 32 on July 2, 1965. The record shows that neither party was actually serving the 100 acre Prison Tract on July 2, 1965.

On June 4, 1986, Governor Thompson announced that the Prison would be built at Canton. The Prison Tract was officially announced as the site where the Prison would be built on August 20, 1986. The evidence shows that throughout this period, CIPS made contacts with DOC, Crawford, Murphy and Tilly, the electrical engineering firm for the Canton Prison, and Bradley, Likens, Dillow and Drayton, the architects for the Canton Prison. Also during this period, Spoon River communicated its desire to serve the new prison site to DOC's Director Michael P. Lane. The record shows that on February 5, 1987 and March 18, 1987, CIPS requested DOC to sign electric service agreements for the Prison; these agreements were never signed.

The City of Canton annexed the Prison Tract to the City on March 17, 1987. At the time of annexation both CIPS and Spoon River had franchises to provide electric service within the corporate limits of the City.

At the time of annexation of the Prison Tract, CIPS and Spoon River had a Service Area Agreement ("Agreement") which had been approved by the Commission in its Order in Docket No. ESA 67, effective June 19, 1968, designating exclusive service areas in which each would provide electric service. Under Paragraph 2 of the Agreement, Spoon River was exclusively entitled to serve the West 80 acres of the Prison Tract and CIPS was exclusively entitled to serve the East 20 acres of the Prison Tract.

At the time the Prison Tract was annexed to the City of Canton, Spoon River had a 7.2 KV single phase line running along the West boundary line of the Prison Tract. CIPS had a 12.5 KV 3 phase line located North of Illinois Route 9.

On October 19, 1987, Michael P. Lane, Director of DOC, wrote to CIPS requesting that a petition be filed to determine, through the Commission, who was the appropriate electric supplier for the Prison Tract. Thereafter, on October 29, 1987, CIPS petitioned for confirmation of its exclusive right to serve the Prison; and Spoon River filed a counter petition seeking a declaration of its right to serve the Prison.

Position of CIPS

CIPS's position is that it has grandfather rights under Paragraph 1(a) of the Agreement which entitle it to serve the Prison to the exclusion of Spoon River. In the alternative, CIPS argued that if the parties have equal grandfather rights, then the customer has the right to choose which electric supplier it desires to use and that DOC chose CIPS by virtue of the location of the meter pole 277 feet within CIPS' territory.

CIPS next argues that Paragraphs 1(b) and 6 of the Agreement permit CIPS to serve the newly annexed Prison Tract to the exclusion of Spoon River. This claim is predicated upon CIPS' contention that its franchise from the City of Canton is a contract in existence to serve customers or premises.

CIPS next argues that under Section 2 of the Agreement, it has superior rights to Spoon River to serve the entire Prison by virtue of the fact that the delivery point for the electrical service is located in CIPS' territory.

Lastly, CIPS argues in the alternative that if the case cannot be decided under Paragraphs 1, 2 and 6 of the parties'

Service Area Agreement, then the Commission should make a determination under Section 8 of the Act and consider the factors enumerated in that Section. CIPS argues that when a consideration of the factors under Section 8 of the Act has been completed, the factors favor granting service to the entire Prison to CIPS rather than Spoon River.

Position of Spoon River

With regard to grandfather rights, Spoon River argues that it has superior rights to CIPS because it was serving two locations on the Gavenda Farm on July 2, 1965, rather than the single location being served by CIPS. In the alternative, Spoon River argues that CIPS has no grandfather rights which are superior to those of Spoon River since both electric suppliers were serving the Gavenda Farm on July 2, 1965.

Spoon River next argues that CIPS cannot claim its franchise is a grandfathered agreement to provide electric service under Paragraph 1(b) of the Service Area Agreement. Spoon River claims that its franchise rights are equal to those of CIPS because under Paragraph 6 of the Agreement the parties have agreed that the annexation of any of their territories will not change the Agreement as to who serves that area, provided each is authorized to serve in the City to which their properties are annexed. Spoon River contends that since both parties had franchises from the City of Canton at the time the Prison Tract was annexed to the City, the Service Area Agreement grants Spoon River the right to serve, at a minimum, the West 80 acres of the 100 acre Prison Tract.

Spoon River next argues that the provisions in Paragraph 2 of the Agreement give Spoon River the right to serve the West 80 acres of the Prison Tract. Unless CIPS affirmatively shows an exception which takes the Prison Tract out of the operation of Paragraph 2, Spoon River argues that it is exclusively entitled to serve the West 80 acres of Prison Tract.

Spoon River advocates that a "point of use" test or, in the alternative, a "geographic load center" test be used. Spoon River contends that the Commission should reject the "point of service" test advocated by CIPS.

With regard to the application of Section 8 of the Act, Spoon River argues that because CIPS failed to bring itself within an exception under Paragraph 2 of the Agreement, Spoon River is authorized to serve at least the West 80 acres of the Prison Tract under the Service Area Agreement, and Section 8 of the Act never comes into play in interpreting the Agreement.

Conclusion

Pursuant to Section 6 of the Act, CIPS and Spoon River entered into a Service Area Agreement approved by Commission Order on June 19, 1968, in Docket No. ESA 67. The Act contemplates that relations between electric suppliers with a Service Area Agreement approved by the Commission under Section 6 of the Act should be governed by such Agreement to the exclusion of the Act itself except insofar as the Agreement incorporates the Act. Rural Electric Convenience Coop. v. Illinois Commerce Commission, 75 Ill. 2d 142, 25 Ill. Dec. 794, 796, 387 N.E. 2d 670 (1979). Therefore, the Service Area Agreement between CIPS and Spoon River is controlling in the resolution of the present service area dispute between CIPS and Spoon River.

The Canton Prison Tract is located partially within the service territory designated to CIPS under Paragraph 2 of the Service Area Agreement. The Agreement also provides that 80 acres of the 100 acre Prison Tract shall be the service territory of Spoon River.

Spoon River had two existing meters and CIPS had one existing meter providing electrical service to locations on the Gavenda Farm as of July 2, 1965. Spoon River had a second electric service at the Gavenda Farm on July 2, 1965, that being Central National Bank and Trust Company of Peoria, as Agent for Barney Gavenda. The Commission is of the opinion that CIPS has no grandfather rights superior to those of Spoon River.

The City of Canton granted franchises to CIPS in October, 1961, and to Spoon River in May, 1972. In March, 1987, the 100 acre Prison Tract was annexed to the City of Canton. The Commission is of the opinion that CIPS' 1961 franchise is not a "contract in existence" on July 2, 1965 under Paragraph 1(b) of the Agreement. Coles-Moultrie Electric Cooperative v. Central Illinois Public Service Company, ESA 228. Both CIPS and Spoon River had a franchise from the City of Canton when the Prison site was annexed to the City of Canton and each is qualified to serve within the meaning of Section 14 of the Act and therefore each is entitled to the benefit of Section 6 of the Agreement.

The Commission is of the opinion that the "point of service" or "point of delivery" test advanced by CIPS should be rejected for one or more of the following reasons: (1) it would frustrate the purposes of the Act in that it would destroy the integrity of territorial boundary lines under service area agreements adopted pursuant to the Act and would encourage disputes between electric suppliers resulting from the location of a "point of service;" (2) it could result in the development of unregulated private electrical distribution lines in this State, contrary to Section

2 of the Act in which the Illinois Legislature declared it to be in the public interest to avoid duplication of electric facilities; (3) it could result in discrimination against small residential and small commercial customers who do not have the financial ability to construct and maintain their own private electric distribution system; (4) it would allow customers along the territorial boundary lines of two electric suppliers to choose the electric supplier that they wanted to use based upon the short term goals of the customer rather than the long term legislative purposes of the Act; and (5) it would encourage the demise of relative boundary certainty under service area agreements adopted by electric suppliers pursuant to the Act, in direct contravention of the expressed purpose of the Act.

The Commission is also of the opinion that the Agreement of the parties grants each party the right to exclusively provide service within the territory allocated to them under the Agreement, and that the "point of use" test most closely accomplishes the parties' intentions under the Agreement with a multi-territorial customer for one or more of the following reasons: (1) it preserves the territorial integrity that the parties desired to create by the adoption of a service area agreement; (2) it presents little chance for complicity between electric suppliers and customers in the selection of an electric supplier; (3) it most closely assists the accomplishment of the legislative purposes and policies to be promoted by the passage of the Act; and (4) in this particular case, the public interest is best served by DOC having the ability to have two independent electric suppliers in cases of emergency.

The Commission having considered all of the evidence presented and being fully advised in the premises, is of the opinion and finds:

- (1) CIPS is an Illinois corporation engaged in the business of generating, transmitting, distributing, furnishing, selling and disposing of electric energy to its customers within the State of Illinois and is a public utility within the meaning of the Illinois Public Utilities Act and is an electric supplier within the meaning of the Act;
- (2) Spoon River is an Illinois corporation engaged in the business of transmitting, distributing, furnishing, selling and disposing of electric energy to its customers within the State of Illinois and is an electric supplier within the meaning of the Act;
- (3) the Commission has jurisdiction over the parties hereto and of the subject matter hereof;

- (4) the statements of fact set forth in the prefatory portion of this Order are supported by the evidence and the record and are hereby adopted as findings of fact;
- (5) under Paragraph 2 of the parties' Service Area Agreement, Spoon River is entitled to exclusively serve the West 80 acres of the Prison Tract and CIPS is entitled to exclusively serve the East 20 acres of the Prison Tract;
- (6) CIPS has no grandfather rights superior to those of Spoon River; CIPS has not established an exception under Paragraph 2 of the Agreement which would prevent Spoon River from serving the West 80 acres of the Prison Tract;
- (7) the meter pole at the Prison was located in the Northeast Quadrant of the Prison Tract in CIPS territory for the convenience of CIPS on the assumption that CIPS would be the sole electric supplier to the Prison;
- (8) there are sites for the meter pole on the West side of the property in Spoon River territory which are equal, from an architectural and engineering standpoint, to the location in the Northeast Quadrant of the Prison Tract;
- (9) the "point of service" or "point of delivery" test advanced by CIPS should be rejected;
- (10) any objections or motions made during the course of these proceedings that remain undisposed of should be considered disposed of in a manner consistent with the ultimate conclusions herein contained.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Spoon River be, and it is hereby, entitled and authorized to provide electric service to the Illinois Department of Corrections, Canton Correctional Center, for that portion of the Correctional Center which is located in the service area of Spoon River (approximately the West 80 acres of the 100 acre Prison Tract) including without limitation the residence buildings which are substantially in Spoon River territory.

IT IS FURTHER ORDERED that CIPS be, and it is hereby, entitled and authorized to provide electric service to the Illinois Department of Corrections, Canton Correctional Center, for that portion of the Correctional Center which is located in the service area of CIPS (approximately the East 20 acres of the

100 acre Prison Tract).

IT IS FURTHER ORDERED that Spoon River shall not furnish electric service to the Illinois Department of Corrections in the territory allocated to CIPS under the Service Area Agreement except as a result of an outage of electrical service provided by CIPS and, conversely, CIPS shall discontinue furnishing electric service to that portion of the Canton Correctional Center located in the territory allocated to Spoon River under the parties' Service Area Agreement except as a result of an outage of electrical service provided by Spoon River.

IT IS FURTHER ORDERED that CIPS and Spoon River shall reasonably cooperate in providing and/or removing facilities which currently serve the Illinois Department of Corrections, Canton Correctional Center, consistent with this Order and in a manner which will reasonably enable the Illinois Department of Corrections to have continuity of service.

IT IS FURTHER ORDERED that any objections or motions made during the course of these proceedings that remain undisposed of be, and they are hereby, disposed of in a manner consistent with the ultimate conclusions herein contained.

By order of the Commission this 4th day of October, 1989.

(SIGNED) MARY B. BUSHNELL

Chairman

(S E A L)

Commissioner Kretschmer dissents; a written opinion will be filed.

Commissioner Manshio dissents; a written opinion will be filed.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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October 11, 1989, Dissenting Opinion to the Order entered by the Commission on October 4, 1989, filed by Commissioner Ruth K. Kretschmer and Commissioner Calvin K. Manshio.

Commissioners Kretschmer and Manshio, dissenting:

The present case involves the Commission's allocation of service area between two electric suppliers through interpretation of the language of their service area agreement. We believe that the Commission's Order does not reflect a reasonable construction of their agreement. As a result, the parties' intentions as expressed in the agreement are not effectuated and the public interest against having duplicative facilities is ignored. If that were not enough, the execution of the Commission's Order involves administrative problems and legal ramifications that negate any potential benefit the Order may contain. For these reasons we must dissent.

This case is the latest of several cases brought under the Electric Supplier Act (ESA). We believe that the facts in this case clearly indicate the inadvisability of supporting the Commission's present disposition.

Both Central Illinois Public Service Company (CIPS) and Spoon River Electric Cooperative Inc. (Spoon River) petitioned for confirmation of exclusive service rights to the Canton Correctional Center. This facility is located within the service territories of both electric suppliers. If either electric supplier were given exclusive rights to serve the Canton center, each supplier's service connection would be made within its respective service area, but the customer's privately owned lines located on its property would bring electric service into the other supplier's service territory. Neither supplier has, in our

opinion, franchise rights superior to the other and both had service points on the property from which the 100 acre tract was divided. These service points existed July 2, 1965, the date the ESA was enacted. Each electric supplier has the capability of serving the entire service needs of the customer. CIPS is presently providing electric service to the Canton Center through a point of service located within CIPS' service territory.

In determining which party is entitled to provide service to the parcel, (in whole or in part), the Commission inappropriately adopts a "point of use" test. This test provides that the Commission will look at the location where the electricity will be used by the customer when deciding service area disputes. In this case, it means that although the Canton Center takes service through a point within CIPS' service area, the Commission will not permit the electricity to flow over the customer's lines into Spoon River's service area. This test places a gloss on the service area agreement that renders it internally inconsistent and contravenes the express intention of the General Assembly for enacting the ESA.

When construing a service area agreement the Commission should seek to effectuate the intentions of the parties. Paragraph 2 of the agreement provides that "[e]ach party may continue to serve any locations or premises... even though such locations or premises be located in the areas designated... as the area of the other party. Clearly the agreement contemplated each party having the ability to provide electric service to customers whose property and lines extended into the other's service area. The Commission's Order conflicts with this provision of the service arrangement. By so doing, the Commission has defined "service area" to eliminate substantial portions of Paragraph 2 of the service area agreement. We believe that the Commission's adoption of the "point of use" test was in error.

Moreover, the Order contravenes the General Assembly's determination in the ESA, Section 2 that it is "in the public interest that, in order to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminish efficiency in electric service to the public, any two or more electric suppliers may contract... as to the respective areas in which each supplier is to provide service." Pursuant to the Commission's Order, both suppliers

will provide service to the 100 acre parcel, with Spoon River serving 80 acres and CIPS the remaining 20. Also, both suppliers must stand ready to serve the entire 100 acre parcel in case of emergency. Thus, CIPS is obligated to serve 20 acres but additionally must also install transmission and distribution facilities capable of serving the entire 100 acre parcel. Spoon River must do likewise. If this is not "duplication of facilities" as referred to in Section 2 of the ESA, we cannot imagine what would be! Incredibly, the Commission's Order states that "[i]n this particular case, the public interest is best served by (the Department of Corrections) having the ability to have two independent electric suppliers in cases of emergency." We believe that the General Assembly has already clearly indicated that it is not in the public interest to duplicate electric suppliers' facilities. The Commission must be circumspect before we find beneficial that which the Legislature has deemed not to be in the public interest.

On occasion, the Commission is called upon in cases and controversies, to balance the interest of the parties and the public. In so doing, we sometimes arrive at a middle ground between the parties' positions. We believe that the present order attempts a Solomonesque solution but succeeds only in the customer's dissection. For the foregoing reasons, We respectfully dissent.

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CERTIFICATE

Re: ESA 249

I, ROSE M. CLAGGETT, do hereby certify that I am Chief Clerk of the Illinois Commerce Commission of the State of Illinois and keeper of the records and seal of said Commission with respect to all matters except those governed by Chapters 18a and 18c of The Illinois Vehicle Code.

I further certify that the above and foregoing is a true, correct and complete copy of order made and entered of record by said Commission on October 4, 1989.

Given under my hand and seal of said Illinois Commerce Commission at Springfield, Illinois, on October 6, 1989.

Rose M. Claggett

Chief Clerk